## APPENDIX 1 — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED DECEMBER 9, 2004

## IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04-60450

VERANDA BEACH, LLC,

Plaintiff-Appellant,

versus

RLI INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(1:02-CV-110-Ro)

Before GARZA, STEWART and CLEMENT, Circuit Judges.

PER CURIAM:*

AFFIRMED. See 5TH CIR. R. 47.6

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* Pursuant to 5TH CIR.R.47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.R.47.5.4.

**APPENDIX 2 — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION DATED AND FILED NOVEMBER 5, 2002**

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI SOUTHERN DIVISION**

CIVIL ACTION NO. 1:02cv110GR

VERANDA BEACH, L.L.C.

PLAINTIFF

VS.

RLI INSURANCE COMPANY

DEFENDANT

**ORDER**

This action is before the Court on motion of the defendant, RLI Insurance Company [RLI] to stay further proceedings [5-1] and to compel the plaintiff, Veranda Beach L.L.C. [Veranda Beach] to submit to arbitration [5-2] to resolve a dispute between the parties pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 3-4. After due consideration of the evidence of record, the briefs of counsel, the applicable law, and being otherwise fully advised in the premises, the Court finds as follows.

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Veranda Beach is the owner and developer of the Magnolia Shores condominium project located in Biloxi, Mississippi. Veranda Beach contracted with a general contractor, United Contractors, Inc. [United Contractors], for construction of the condominium units. The contract is a standard American Institute of Architects [AIA] contract and contains arbitration provisions for disputes arising between Veranda Beach and United Contractors. (Pl.'s Resp., Exhs. C-D.) The contract refers to a performance bond to cover faithful performances of the construction contract. (*Id.*, Exh. D, ¶ 11.5.) RLI sold and issued a performance bond binding the contractor, Colonial Builders, L.L.C. and the surety, RLI, to Veranda Beach for performance of the contract. (*Id.*, Exh. E.) The performance bond does not contain an arbitration provision, but does provide that any lawsuit brought against RLI be brought in a court of competent jurisdiction where the work is located which would be Biloxi, Mississippi. (*Id.*, ¶ 9.) Section six of the performance bond obligates RLI for correction of defective work and completion of the construction contract by the contractor; legal, design, professional and delay costs resulting from contractor's default and RLI's actions or failure to act; and actual or liquidated damages, whichever may be applicable. (*Id.*, ¶ 6.)

In March 2001, Veranda Beach put United Contractors on notice that it had defaulted on the construction contract because of construction delays, defects and deficiencies, and other alleged violations of the contract. (*Id.*, Exh. A, ¶ 4.) Under the performance bond, RLI was notified of the default. (*Id.*) A meeting was held on April 30, 2001, to arrange for completion of the project. (*Id.*) Representatives from Veranda Beach, United Contractors, and RLI were present at the

meeting. (*Id.*) Robert Gentle of RLI agreed to take over payment, supervision and completion of the project at that meeting. (*Id.*) In accordance with the terms of the performance bond, Veranda Beach notified United Contractors and RLI that the construction contract was terminated effective May 16, 2001. (*Id.*)

RLI and Veranda Beach executed a memorandum of understanding on May 25, 2001, which provided in part as follows:

> Work will be completed in accordance with the plans and specifications of the architect and the Surety [RLI] acting through its consultant Robert C. Gentle, will oversee and be responsible for scheduling completion of the project.
>
> * * *
>
> Upon full completion of the project, the parties will discuss and negotiate any claims between the parties including, but not limited to, liquidated damages, change orders, time extensions, claims by sub-contractors for extra work, etc. The purpose for this function is to provide dialogue between the parties to settle all outstanding issues in this project. This function will be handled with and through the surety's consultant, Robert C. Gentle and the architect, Gerald J. Hopkins. All unreconciled disputes between the owner, the contractor, and the surety will be resolved as provided by the contract.

(*Id.*, Exh. F.)

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According to the plaintiff, the memorandum of understanding was altered by United Contractors through the addition of a handwritten note on the bottom of page 2 of the document. (*Id.*, Exh. A, p. 4.) The plaintiff maintains that this was not agreed language and was objected to at the time of the alteration. (*Id.*, and Exh. G.)

Construction was not completed on the condominium project and RLI eventually ceased hiring, supervising or paying contractors, subcontractors, suppliers or workers on the project.(*Id.*, Exh. A, p. 5.) When the project was abandoned, completion of the project was more than a year late and Veranda Beach contends there were over 50 defects and deficiencies in the workmanship on the project. (*Id.*) Veranda Beach filed suit against RLI for violations of the performance bond. (Compl.)

RLI claims that a portion of the memorandum of understanding provides that there was an agreement to arbitrate all claims by Veranda Beach against RLI. The provision provides as follows: "All unreconciled disputes between the owner, the contractor and the surety will be resolved as provided in the contract." (Ct. R., Doc. 1, Exh. B, p. 2.) Veranda Beach contends that there was no agreement to arbitrate between Veranda Beach and RLI. The plaintiff contends the memorandum of understanding is not binding on the parties because United Contractors did not sign the original document, but instead proposed a new memorandum of understanding when it added the handwritten provision to its copy of the document and signed it. (Pl.'s Resp., pp. 10-11.) The addition indicated that United Contractor's agreement to the memorandum of understanding

was conditioned on payment until the project is completed. (Mot. to Compel, Exh. 1, p. 2.) Veranda Beach maintains that because it never signed this document there was never a binding memorandum of understanding. (Pl.'s Resp., p. 11.) In addition, the plaintiff argues that RLI was not a party to the construction contract and the contract specifically provides that it does not establish a contractual relationship between any parties other than Veranda Beach and United Contractors. (*Id.*, p. 2.)

**Discussion**

Section 2 of the Federal Arbitration Act [FAA] provides that "[a] written provision in .. . a contract ... to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The arbitration process is strongly favored in federal courts. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991). The Court will not, however, compel a party to arbitrate a dispute unless the party has agreed to arbitration. *See United Steelworkers* of *Am. v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960). The Court must initially determine if there is a valid agreement to arbitrate between the parties, and whether the grievance before it is subject to arbitration. *Webb v. Investacorp., Inc.*, 89 F.3d 252, 257-8 (5th Cir. 1996); *Folse v. Richard Wolf Med. Instruments, Corp.*, 56 F.3d 603, 605 (5th Cir. 1995). State law contract principals are used to determine if there is a valid agreement to arbitrate. *First Options* of *Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Webb*, 89 F.3d at 257. All doubts are resolved in favor of

arbitration. *Harvey v. Joyce*, 199 F.3d 790, 793 (5th Cir. 2000). Section 3 of the FAA provides for the stay of proceedings in federal district court when an issue is referable to arbitration. 9 U.S.C. § 3.

The Court must determine whether the parties agreed to arbitrate the dispute in question by considering whether there is a valid agreement to arbitrate between the parties and the dispute falls within the scope of the arbitration agreement. *R.M. Perez & Assoc., Inc. v. Webb*, 960 F.2d 534, 538 (5th Cir. 1992). The Court must grant the motion to arbitrate provided there is no rule of contract law which makes the arbitration clause or the contract unenforceable, and the dispute involves a matter arising out of the contract. 9 U.S.C. § 2. "[W]hether ... the company was bound to arbitrate, as well as what issues it must arbitrate is a matter to be determined by the Court on the basis of the contract entered into by the parties." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964). The court must also find that the arbitration clause in question is "susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of Am. v. ASARCO, Inc.*, 970 F.2d 1448, 1450 (5th Cir. 1992). In this case the Court finds that the arbitration clause covers the parties' dispute regarding proper and timely completion of the construction contract.

A non-signatory to a contract containing an arbitration provision may compel arbitration against the signatory of that contract only if one of these conditions are met: (1) the signatory "raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract" or (2) the signatory

"must rely on the terms of the written agreement in asserting its claims against the non-signatory." *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000), *reh'g en banc denied* 218 F.3d 745 & *cert. denied*, 531 U.S. 1013. The Court finds that the dispute regarding liability for the alleged default in the construction contract is precisely why the performance bond was procured. Accordingly, the Court further finds that RLI can move to enforce the arbitration clause even though RLI did not sign the construction contract.

Furthermore, when a performance bond incorporates the provisions of a contract, the arbitration provisions of the contract are made part of the bond and are applicable to disputes involving the surety. *J. S. & H. Constr. Co. v. Richmond County Hosp. Auth.*, 473 F. 2d 212, 216 (5th Cir. 1973). Although neither party provides reference to this well-settled rule, the Court has found that the performance bond specifically incorporates the construction contract as shown by the following:

> The Contractor and the Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner for performance of the Construction Contract, which is incorporated herein by reference.

(Compl., Exh. A, p. 2, ¶ 1.)

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This provision renders Veranda Beach's claims subject to the arbitration clause. *See Smith v. Equifirst Corp.*, 117 F. Supp.2d 557, 566 (S.D. Miss. 2000). Accordingly, the Court concludes that RLI is entitled to seek enforcement of the arbitration clause. The arbitration clause at issue can easily be construed to cover the dispute between the parties concerning the alleged breach of contract. The Court, therefore finds that an order compelling arbitration should issue in this case. *See District 37 of Int'l Assn of Machinist & Aerospace Workers*, 897 F.2d 768, 773 (5th Cir. 1990). The Court further finds that the defendant's motion to stay these proceedings should be granted. It is therefore,

ORDERED AND ADJUDGED that defendant's motion to *stay this action* and compel the defendants to submit to arbitration [5-1, 5-2] to resolve a dispute between the parties be, and is hereby, granted. It is further,

ORDERED AND ADJUDGED that *the parties in this action submit the disputed matter to arbitration.* It is further,

ORDERED AND ADJUDGED that the Clerk of the Court is hereby directed *to close this action for statistical purposes* and place this case *on the inactive docket* of this court. It is further,

ORDERED AND ADJUDGED that *all parties shall file a status report* with the Court within ten days of the conclusion or arbitration, or in any event by no later than one year from the entry date of this order. *Failure to comply with this order may result in sanctions* as deemed appropriate by this court against the offending party. It is further,

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ORDERED AND ADJUDGED that *any party may move to reinstate this cause on the active docket* of this court at the conclusion of arbitration if necessary. It is further,

SO ORDERED AND ADJUDGED, this the 4th day of November, 2002.

s/ [illegible]
UNITED STATES DISTRICT JUDGE